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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 551

STOVES, INCORPORATED,
Petitioner,

vs.

TENNESSEE ENAMEL MANUFACTURING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

and

BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

	Page
Petition for Writ of Certiorari	1-8
Summary statement of the matter involved	1
This court has jurisdiction	5
Question presented	7
Reasons relied on for the allowance of the writ	7
Prayer for writ	8
Brief in Support of Petition for Writ of Certiorari	9-19
The opinion below	9
Jurisdiction	9
Statement of the case	10
Specification of errors	15
Argument	16
Summary of argument	16
Point A	16
Point B	17
Point C	18
Conclusion	19

Cases Cited.

Adamson v. Gilliland, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356 ..... 5, 6, 7, 15, 17, 18

Anderson v. May, 57 Tenn. 84, Anno. 105 A. L. R. 655 .. 19

Dougherty, Adm'r, v. Curle, 21 Tenn. 453 19

Eaves v. Gillespie, 31 Tenn. 129 19

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 ..... 3, 6, 7, 15, 18, 19

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477.....3, 6, 7, 15, 18, 19

Leroux & Co. v. Merchants Distilling Corp., 7 Cir., 165 F. (2d) 481.....5, 16

Ruud v. American Packing and Provision Co., 9 Cir., 177 F. (2d) 538.....5, 16

U. S. v. National Assoc. R. E. B., 339 U. S. 485, 70 S. Ct. 711, 94 L. Ed. 1007.....6, 7, 15, 17, 18

Walling v. Gen. Industries Co., 330 U. S. 545, 67 S. Ct. 883, 91 L. Ed. 1088.....5, 6, 17, 18

West v. American Tel. & Tel. Co., 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, 132 A. L. R. 956.....4, 7, 15, 18

Other Authorities Cited.

Rule 52 (a), Federal Rules of Civil Procedure..6, 7, 15, 17, 18

Supreme Court Rule 38, par. 5 (b).....5, 10

28 U. S. C. A., Sec. 1254 (1).....6, 7, 9

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Only one question is presented to this Court—whether a Court of Appeals should be allowed to reject the findings of a United States District Court in a case tried without a

jury, which findings admittedly depended upon conflicting testimony and credibility of witnesses, where the **Court of Appeals based its rejection on the credibility of witnesses.**

This is an action for damages for breach of contract brought by petitioner, Stoves, Incorporated, a Louisiana corporation, against respondent, Tennessee Enamel Manufacturing Company (herein called Temco), a Tennessee corporation. The suit was brought in the United States District Court for the Middle District of Tennessee (R. 2-5). Temco denied the making of the contract and pleaded the statute of frauds of Tennessee and Florida, applicable to oral contracts for the sale of personal property (R. 10-12).

The case was tried by the District Court without a jury on one principal issue, that is, whether or not Stoves, Inc., and Temco entered into a distributorship agreement whereby Stoves, Inc., would be granted the exclusive distributorship for the State of Florida during the year of 1948 and Temco would furnish Stoves, Inc., at least five carloads of stoves during the year of 1948. Several witnesses testified that the agreement was made (R. 61, 73-74, 76, 100-101, 120, 131-132). Mr. Evans, president of Temco, denied that Temco made such a contract (R. 139).

By agreement of counsel, the trial court passed upon the defense of statute of frauds prior to the introduction of evidence. The trial court held that the substantive rights of the parties were to be determined according to local law, and that the Supreme Court of Tennessee had decided that the validity of a contract, so far as it may be affected by the statute of frauds, should be determined by the law of the state where the contract was made, and for that reason the law of Louisiana, relative to the statute of frauds, was applicable since the alleged contract was made in Louisiana (R. 53, 55-56).

After hearing and considering the evidence, the trial court held that the contract **was not a contract of sale, but a distributorship or franchise agreement** whereby Stoves, Inc., "would be granted the exclusive distributorship franchise for the State of Florida during the year of 1948 and that the defendant (Temco) would furnish the plaintiff (Stoves, Inc.) with at least five carloads of stoves" (R. 196), and for this reason the trial court held that "the validity of the contract between the plaintiff (Stoves, Inc.) and the defendant (Temco) is not affected by the statute of frauds pleaded by defendant (Temco)" (R. 197). The trial court further held that the contract was breached, and rendered a decree in favor of petitioner in the sum of $7500.00 (R. 195-197).

The principal questions, together with some minor related questions, presented on appeal were: (1) whether or not the validity of the contract was affected by the statute of frauds, and, (2) if so, whether the statutes of Louisiana, Tennessee or Florida were applicable.

The Court of Appeals did not discuss the first question, and as to the second question, after recognizing the controlling decisions of Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, and Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477, the Court of Appeals refused to apply the decisions to this case and stated the following:

> "The rule established by the Supreme Court in Klaxon Co. v. Stentor Co., 313 U. S. 487, is that, in diversity of citizenship cases, the federal courts, when deciding questions of conflict of laws, must follow the rules prevailing in the states in which they sit. Independent decision upon our own reasoning and upon the authority of federal decisions on a question of conflict of laws having been thus curtailed, we are

reduced to the position of mere annotators of state law. An annotator is, of course, not empowered to speak with the authority of an unrestrained court in construing, distinguishing, or applying opinions apparently in conflict. Interpretation of state law by a United States Court of Appeals may be repudiated by the courts of the state whose laws are being construed. Our opinions in this field of state law, therefore, have no binding authoritative effect. Of course, we are compelled by the doctrine of Erie Railroad Company v. Tompkins, 304 U. S. 64, in diversity of citizenship cases, to be annotators of state law where such annotation is necessary to decision. But where it is unnecessary to decision, we are unwilling to assume the unenviable role for an appellate court of the United States of having our pronouncements put in jeopardy of being declared incorrect by a state court inferior to the highest court of the state. Thus far we strive to uphold the innate dignity of a federal appellate court" (R. 230).

The Court of Appeals in its over-zealous struggle to prevent its own decisions from being declared incorrect by an intermediate state court (apparently having reference to the case of West v. American Tel. & Tel. Co., 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, 132 A. L. R. 956) determined that the Court of Appeals was the proper Court to weigh the credibility of witnesses. **The Court of Appeals rejected the trial court's findings because it found that the witnesses for Stoves, Inc., were not worthy of belief, but that the witnesses for Temco were worthy of belief** (R. 221-222). The findings made by the Court of Appeals, which it considered controlling, were inaccurate and not sustained by the record or were based on conflicting testimony (Statement of the Case, Brief, infra, pp. 13-15). The Court of Appeals did so, notwithstanding the fact that the trial court's findings were amply supported

by the record and in many instances the facts found by the trial court were admitted by some of the witnesses for Temco. The substance of the evidence sustaining the distributorship agreement is discussed fully under "Statement of the Case," Brief, infra, pp. 10-15, reference to which is here made.

THIS COURT HAS JURISDICTION.

In this case the Court of Appeals for the Sixth Circuit Court "rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter" [Supreme Court Rule 38, par. 5 (b)]. The Court of Appeals for the Seventh Circuit has held that "weighing the credibility of the witnesses is the trial judge's responsibility. . . . His judgment as to credibility is final." Leroux & Co. v. Merchants Distilling Corp., 7 Cir., 165 F. (2d) 481; See also Ruud v. American Packing and Provision Co., 9 Cir., 177 F. (2d) 538.

This case involves "an important question of federal law which has not been, but should be, settled by this Court" [Supreme Court Rule 38, par. 5 (b)]. This Court has never decided that in cases tried by a District Court without a jury, weighing the credibility of the witnesses is solely the responsibility of the trial court and that its judgment as to credibility is final. It is true that this court has, in the case of Adamson v. Gilliland, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356, held that "so far as the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.'" This Court has also held that the findings of the trial court are binding on the appellate courts unless such findings are "clearly erroneous." Walling v. Gen. Industries Co., 330

U. S. 545, 67 S. Ct. 883, 91 L. Ed. 1088; U. S. v. National Assoc. R. E. B., 339 U. S. 485, 70 S. Ct. 711, 94 L. Ed. 1007.

In this case the Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this Court [Supreme Court Rule 38, par. 5 (b)]. The Court of Appeals in rendering its decision violated the rule announced by this Court that findings of fact cannot be set aside by an appellate court merely because the appellate court "might give the facts another construction, resolve the ambiguities differently and find a more sinister cast to actions which the District Court apparently deemed innocent." U. S. v. National Assoc. R. E. B., 339 U. S. 485, 70 S. Ct. 711, 94 L. Ed. 1007. By its decision the Court of Appeals violated the well established rule announced by this Court, that the Court of Appeals cannot disturb findings of the District Court which are not clearly erroneous. Walling v. Gen. Industries Co., 330 U. S. 545, 67 S. Ct. 883, 91 L. Ed. 1088; Adamson v. Gilliland, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356.

Jurisdiction should not be hastily denied because of the outward appearance that this case merely calls for a proper decision of a fact and is, therefore, of no general importance. **If the opinion and judgment of the Court of Appeals in this case is allowed to stand, the future administration of the federal law in the Sixth Circuit will be seriously hindered. The cases of Erie R. Co. v. Tompkins, supra, West v. American Tel. & Tel. Co., supra, Klaxon Co. v. Stentor Electric Mfg. Co., supra, and Rule 52 (a) of the Federal Rules of Civil Procedure, will have been rendered fruitless to all future litigants of the federal courts within the Sixth Circuit, merely because the effect and purpose of said decisions and rule apparently are not in accord with the reasoning of the Court of Appeals for the Sixth Circuit.**

This Court has explicit authority to review by certiorari the decision of the Court of Appeals [28 U. S. C. A., Sec-

tion 1254 (1)], and **this Court has properly allowed the writ where a Circuit Court of Appeals rejected a finding made by the trial court and based its rejection upon conflicting testimony. Adamson v. Gilliland, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356.**

QUESTION PRESENTED.

The question herein presented is whether a Court of Appeals should be allowed to reject a District Court's findings of fact in an action tried without a jury, which findings admittedly depended upon conflicting testimony and the credibility of witnesses, and the Court of Appeals based its rejection on the credibility of the witnesses.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) This Court should allow the writ of certiorari in this case in order to secure a uniformity of decision among the circuits, on the question of whether or not the decision of a District Court on the credibility of witnesses is final.

(2) The Court of Appeals for the Sixth Circuit has violated the rule announced by this Court in the cases of Adamson v. Gilliland, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356, and U. S. v. National Assoc. R. E. B., 339 U. S. 485, 70 S. Ct. 711, 94 L. Ed. 1007, and ignored Rule 52 (a) of Federal Rules of Civil Procedure, in order to escape following the mandate announced in the cases of West v. American Tel. & Tel. Co., 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, 132 A. L. R. 956; Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, and Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477.

(3) A Court of Appeals should not be allowed to reject the findings of a United States District Court in a case

tried without a jury, which findings admittedly depended upon the conflicting testimony and credibility of witnesses, where the Court of Appeals based its rejection on the credibility of witnesses.

Wherefore, your petitioner prays that the writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and to send to this Court a full and complete transcript of the record and of the proceedings of the United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket, No. 11,288, Stoves, Inc., Appellee, v. Tennessee Enamel Manufacturing Company, Appellant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Sixth Circuit be reversed by the Court, and for such further relief as this Court may deem proper.

Dated January 18, 1952.

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Respondent.

BRIEF

In Support of Petition for Writ of Certiorari.

OPINION BELOW.

The opinion of the Court of Appeals for the Sixth Circuit has not as yet been reported. The opinion is printed in full in the record (R. 220-230).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254 (1), 28 U. S. C. A. The Court of Appeals "has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter"; "has decided an important question of federal law which has not

been, but should be, settled by this Court" and "has decided a federal question in a way probably in conflict with applicable decisions of this Court" [Supreme Court Rule 38, par. 5 (b)].

Judgment was entered in this case by the Court of Appeals on December 4, 1951 (R. 219).

STATEMENT OF THE CASE.

Stoves, Inc., a Louisiana corporation, is a distributor or jobber or a wholesale dealer in gas heating stoves and floor furnaces, with its principal place of business in New Orleans, Louisiana (R. 2-3, 9).

Tennessee Enamel Manufacturing Company (herein called Temco) is a Tennessee corporation, with its principal place of business in Davidson County, Tennessee. Temco is engaged in manufacturing gas heating stoves and floor furnaces of various types and sells them through distributors, jobbers and wholesale dealers (R. 2-3, 9).

During the early and middle part of 1947 Temco was without a distributor for the State of Florida (R. 59, 142). Stoves, Inc., was organized for the purpose of doing business as a distributor or wholesale dealer of gas heating stoves and floor furnaces, and Mr. Evans, president of Temco, "had known of the fact that Stoves, Inc., was organized when it was organized" (R. 57, 97-98, 142, 195). Mr. Hunt, the sales representative of Temco, and Mr. Evans, its president, were anxious to obtain a distributor for the State of Florida and it was agreed to between Stoves, Inc., and Temco that Stoves, Inc., would have the exclusive distributorship for the State of Florida for the remainder of 1947 (R. 59, 99, 142), at which time Stoves, Inc., and Temco would decide whether to continue (R. 152). Upon Mr. Evans promising Stoves, Inc., that it could have said distributorship, Stoves, Inc., accordingly

entered upon performance of the agreement by opening offices in Florida, making preparations to sell and distribute Temco's stoves, and shortly thereafter commenced selling and distributing said stoves (R. 59-60, 99). Stoves, Inc., had a very satisfactory season for the remainder of the year of 1947 (R. 59-60, 100, 120, 136). In the last days of 1947 Temco's president, Mr. Evans, made a trip to New Orleans, combining business and pleasure (R. 60, 136). **During this time Mr. Evans went to the offices of Stoves, Inc., and entered into an agreement on behalf of Temco whereby Stoves, Inc., would be the exclusive distributor for Temco in the State of Florida for the year of 1948, and agreed that Temco would furnish to Stoves, Inc., at least five carloads of stoves during the year of 1948** (R. 60-61, 76, 100, 120). It was not known at that time whether the scarcity of steel and shortage of stoves would continue, and Stoves, Inc., was anxious to know whether or not it could get shipments of stoves (R. 20, 100, 132, 134). There was neither a specific written nor oral provision concerning the length of the term of the distributorship agreement, but the various distributorship agreements of Temco usually ran from year to year and this custom was admitted by witnesses for Temco (R. 152, 172).

Both Stoves, Inc., and Temco considered that the distributorship agreement was binding and in effect from and after its making, which was entered into during the last few days of December, 1947.

Such an interpretation was placed upon the agreement by Stoves, Inc., because:

(1) Stoves, Inc., immediately commenced promoting Temco's product for the 1948 business upon reliance of the distributorship agreement (R. 61).

(2) Stoves, Inc., purchased a new station wagon and obtained a new office with much larger space with addi-

tional expense upon reliance of the distributorship agreement (R. 23).

(3) The president of Stoves, Inc., J. J. Toledano, went to Florida about February 2nd or 5th and employed another salesman upon reliance of the distributorship agreement (R. 62).

(4) Stoves, Inc., immediately made arrangements for a display of Temco's products at the Gasparillo Fair upon reliance of the distributorship agreement (R. 61).

Temco considered the distributorship agreement binding from and after its making because:

(1) Temco subsequently participated in the promotion of the product in Florida for the 1948 business (R. 61).

(2) Temco admitted that its distributorship agreements were renewed from year to year (R. 152, 170) and admitted the discussion of the Florida distributorship during the last few days of 1947 with Stoves, Inc. (R. 136, 141). It is, therefore, unreasonable to assume that both Stoves, Inc., and Temco would commence spending time and money for the 1948 business if the agreement had not been made.

(3) Temco's president admitted that the first distributorship agreement would terminate at the close of 1947, at which time Temco and Stoves, Inc., would decide whether to continue (R. 152).

(4) Temco admitted it did not make any plans to discontinue Stoves, Inc., as its distributor until after sometime in March of 1948 (R. 169), although Temco admitted that these distributorship agreements were renewed from year to year (R. 152, 170). Temco did not contemplate discontinuing Stoves, Inc., as its distributor until it discharged Hunt (R. 156), which occurred in February, 1948 (R. 115).

The Court of Appeals, in addition to weighing the credibility of the witnesses (R. 221-222), also weighed the testimony and set forth its own findings of fact (R. 222-226). Without reviewing the entire opinion, counsel for Stoves, Inc., desire to quote some of the findings of the Court of Appeals which it considered as controlling, and make reference to the record pertaining to these findings for the purpose of demonstrating that the findings are either inaccurate and not sustained by the record, or else the findings are based on evidence which is in conflict with other evidence.

1. "Attorney Thrasher was the only witness, however, who stated that Evans was present when Hunt agreed to the delivery of five carloads of stoves to Stoves, Inc., for the Florida territory in 1948" (R. 224).

The record shows that M. A. Quinn, a witness for Temco, admitted on cross-examination that Mr. Evans was present during the discussion (R. 181).

2. "It should be noted that Toledano testified that Evans was not present when he contracted with DeFuentes and Hunt; . . ." (R. 224).

On page 76 of the record Mr. Toledano testified that he did not know whether Evans was present or not.

3. M. A. Quinn testified "that he was present when Evans met with Toledano, DeFuentes and Hunt in New Orleans during the latter part of December, 1947; that he never heard anything about Stoves, Inc., buying five carloads of heaters from appellant (Temco) for delivery to Tampa, Florida; . . ." (R. 224-225).

The record shows that Quinn, a witness for Temco, was not certain about this conversation on direct examination and did not remember all of the details (R. 177). On cross-examination, however, Quinn admitted that he re-

membered about the agreement; that Mr. Evans was pres-
ent at the time; that as far as he kn w the distributorship
was to be granted to Stoves, Inc., f or 1948; and that he
did not remember the exact numb r of carloads agreed
upon, and when asked about the ap proximate number, he
said that five carloads were discuss ed (R. 181).

4. R. N. Smith, secretary-treasu er for Temco, was
"asked if he would have approved the credit of Stoves,
Inc., for five carloads of heaters, he a swered categorically,
'No'" (R. 225).

Mr. Smith, after making the ans er as stated by the
Court of Appeals (R. 165), testified t at he would not have
approved the credit for five cars a t one shipment, but
would have approved the credit if th stoves were shipped
one car at a time (R. 165). It was never contended by
Stoves, Inc., that all five carloads w ere to be shipped at
any one time, but, on the contrary, i t was contended that
the stoves were to be delivered fron time to time during
the year of 1948 (R. 61, 102, 120, 134).

5. "The point of the ennessee aut norities is that usages
or customs of trade, to be effectively binding in law, must
be imperative and compulsory in c haracter and so well
known as to affect the person to be b ound with knowledge
of them and raise the presumption that he dealt with
reference to them. The direct testim ony of both President
Evans and Secretary-Treasurer Sm ith of the appellant
company (Temco) was that all purc ase orders had to be
approved by its home office and ackn owledged to the pur-
chaser or distributor. This testimo ny has not been suc-
cessfully impeached" (R. 228).

The record clearly shows that E vans and Smith, wit-
nesses for Temco, admitted that it was the custom and
usage of Temco to enter into distri butorship agreements
"from year to year" (R. 152, 170), an d the record is undis-

puted that Temco had a custom that nearly all of its distributorship agreements were oral (R. 109, 149). Evans admitted "we have oral agreements with all of our distributors" (R. 149).

On the contrary it will be noted from the record that every finding made by the District Court is supported by material evidence, although on some findings there is conflicting testimony in the record.

SPECIFICATION OF ERRORS.

1. The Court of Appeals erred by weighing the credibility of the witnesses.

2. The Court further erred by weighing the conflicting testimony and rejecting the trial court's findings.

3. The Court further erred by violating the rule announced by this Court in the cases of Adamson v. Gilliland, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356, and U. S. v. National Assoc. R. E. B., 339 U. S. 485, 70 S. Ct. 711, 94 L. Ed. 1007, and ignoring Rule 52 (a) of Federal Rules of Civil Procedure, in order to escape following the mandate announced in the cases of West v. American Tel. & Tel. Co., 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, 132 A. L. R. 956; Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188; and Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477.

ARGUMENT.

SUMMARY OF ARGUMENT.

POINT A: The Court of Appeals erred by weighing the credibility of the witnesses.

POINT B: Findings of a District Court tried without a jury, which depends on conflicting testimony, or credibility of witnesses, and there is testimony consistent with the findings, must be treated as being unassailable.

POINT C: Uniformity in the administration of the law of the state is necessary to the administration of federal justice, notwithstanding the curtailment of independent decisions of the various Circuit Courts of Appeals.

POINT A.

The Court of Appeals erred by weighing the credibility of the witnesses.

The Court of Appeals for the Sixth Circuit found that the witnesses for Stoves, Inc., were not worthy of belief, but that Evans' testimony was acceptable to belief (R. 221-222), and thereupon rejected the trial court's findings.

This question has heretofore been decided by the Court of Appeals for the Seventh Circuit in the case of Leroux & Co. v. Merchants Distilling Corp., 165 F. (2d) 481, and by the Court of Appeals for the Ninth Circuit in the case of Ruud v. American Packing and Provision Co., 177 F. (2d) 538. It was held in both cases that weighing the credibility of witnesses was solely the responsibility of the trial judge and the trial court's judgment, as to credibility of witnesses whose testimony was conflicting, was final. This question, in so far as counsel have been able to find, has not been decided by this Honorable Court.

It is submitted that it is of public importance that the law on the subject be made clear by this Honorable Court beyond the possibility of misunderstanding.

POINT B.

Findings of a District Court tried without a jury, which depends on conflicting testimony, or credibility of witnesses, and there is testimony consistent with the findings, must be treated as being unassailable.

The Court of Appeals, in addition to weighing the credibility of the witnesses (R. 221-222), also weighed the conflicting testimony and set forth its own findings of fact (R. 222-226). This was clearly error. Furthermore, the Court of Appeals made findings which were "clearly erroneous" according to the record (Statement of the Case, Brief, supra, pp. 13-15).

This decision of the Court of Appeals is clearly in conflict with the decision of this Court made in the case of U. S. v. National Assoc. R. E. B., 339 U. S. 485, 70 S. Ct. 711, 94 L. Ed. 1007. The Court of Appeals also violated Rule 52 (a), Federal Rules of Civil Procedure, and ignored the holdings of this Court in the cases of Walling v. Gen. Industries Co., 330 U. S. 545, 67 S. Ct. 883, 91 L. Ed. 1088, and Adamson v. Gilliland, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356, which holds that a Court of Appeals cannot disturb findings of a District Court which are not clearly erroneous.

Every finding of fact made by the District Court was supported by material evidence. The other Circuit Courts of Appeals follow the foregoing decisions and Rule 52 (a) of the Federal Rules of Civil Procedure and it seems only fair that the Court of Appeals for the Sixth Circuit should do likewise.

POINT C.

Uniformity in the administration of the law of the state is necessary to the administration of federal justice notwithstanding the curtailment of independent decisions of the various Circuit Courts of Appeals.

If the Court of Appeals had properly followed the well-established rule announced in the cases of U. S. v. National Assoc. R. E. B., 339 U. S. 485, 70 S. Ct. 711, 94 L. Ed. 1007; Walling v. Gen. Industries Co., 330 U. S. 545, 67 S. Ct. 883, 91 L. Ed. 1088, and Adamson v. Gilliland, 242 U. S. 350, 37 S. Ct. 169, 61 L. Ed. 356, and followed Rule 52 (a) of the Federal Rules of Civil Procedure, it follows that the Court of Appeals would have been compelled to follow the mandate announced in the cases of Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188; West v. American Tel. & Tel. Co., 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, 132 A. L. R. 956, and Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477.

The Court of Appeals stated in its opinion that "we are unwilling to assume the unenviable role for an appellate court of the United States of having our pronouncements put in jeopardy of being declared incorrect by a state court inferior to the highest court of the state. Thus far we strive to uphold the innate dignity of a federal appellate court" (R. 230). The Court of Appeals apparently had reference to the case of West v. American Tel. & Tel. Co., 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139, 132 A. L. R. 956, in which the Court of Appeals for the Sixth Circuit had declined to follow the Erie Railroad case, on the ground that a federal appellate court should not be bound "by a state court inferior to the highest court of the state."

Even if the Court of Appeals did not agree with the reasoning announced in the Tennessee decisions (Anderson v. May, 57 Tenn. 84, Anno. 105 A. L. R. 655; Dougherty, Adm'r, v. Curle, 21 Tenn. 453, and Eaves v. Gillespie, 31 Tenn. 129) on the conflict of law question, it was the duty of the Court to approve the action of the trial court in following the cases in conformity with the case of Erie R. Co. v. Tompkins, supra.

This Court should grant certiorari, reverse the Court of Appeals and reinstate the judgment of the District Court in order to preserve uniformity in the administration of the law of the State of Tennessee.

CONCLUSION.

The District Court made findings of fact which were amply supported by material evidence. The District Court followed the decisions of this Court (Erie R. Co. v. Tompkins, supra, and Klaxon Co. v. Stentor Electric Mfg. Co., supra), in deciding the principal legal question involved. The Court of Appeals, while declining to follow the decisions of this Court, weighed the credibility of the witnesses and used that method as an excuse to reverse the District Court and dismiss the suit.

We respectfully submit, therefore, that the petition for certiorari in this case should be granted.

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IN THE

SUPREME COURT OF THE UNITED STATES.

STOVES, INCORPORATED, Petitioner,

vs.

TENNESSEE ENAMEL MANUFACTURING COMPANY, Respondent.

No. 551.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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SUBJECT INDEX.

	Page
Statement of the case	1
Court of Appeals decided question of law	2
Findings not dependent on credibility of witnesses	3
Uniformity of decision on question presented is already provided for by Rule 52 (a)	5
Conclusion	5
Federal Rules of Civil Procedure, Rule 52 (a)	5

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May it please the Court:

STATEMENT OF THE CASE.

The petition for certiorari state that only one question is presented to this Court—"whether a Court of Appeals should be allowed to reject the findings of a United States District Court in a case tried without a jury, which findings admittedly depended upon conflicting testimony and credibility of witnesses, where the Court of Appeals bases its rejection on the credibility of witnesses."

That this question is not, however, presented by the record in the cause will be seen from the opinions of the district judge (R. 187-193) and of the Court of Appeals

(R. 220-230). The findings depended not on credibility of witnesses, but on an analysis of the evidence and of the permissible inferences to be drawn. The judgment of the district court was reversed not only on a question of fact—that the contract was not made—but also on a question of law—that it was unenforceable for lack of mutuality (R. 228-229).

Respondent does not agree with the statements in the petition (pp. 2-3) as to what was the principal issue tried in the district court or as to what were the principal questions presented to the Court of Appeals. If it should be deemed important to determine what that issue was and what those questions were, we refer the Court to the opinion of the Court of Appeals and to our briefs filed in that Court.

COURT OF APPEALS DECIDED QUESTION OF LAW.

In holding that the supposed contract was unenforceable for lack of mutuality (R. 228-229) the Court of Appeals followed Tennessee law and cited Tennessee authorities as well as one of its own prior decisions in a case also arising in Tennessee. The district judge did not, in his opinion, mention this controlling legal principle—presumably because in deciding the case on a different theory from that advanced by the plaintiff, and on a cause of action not alleged in the complaint, he had not been given the opportunity to consider the legal defects and weaknesses in such theory.

Since the Court of Appeals decided the case on this question of law, which would have been determinative even if the Court of Appeals had taken the same view of the evidence as the district court, it is clear that the question presented by the petition for certiorari is not presented by the record.

FINDINGS NOT DEPENDENT ON CREDIBILITY OF WITNESSES.

With respect to credibility of witnesses, the district judge said (R. 187): "It is just one of those cases where it seems to me that one side has stretched the truth just a little and the other side hasn't told quite all the truth." It is clear that the judge referred to the petitioner, Stoves, Inc., as having stretched the truth and to respondent, Temco, as not having told all the truth.

Stretching the truth is affirmative misrepresentation. Not telling all the truth may or may not be concealment, depending upon the circumstances. In the case at bar there was no concealment by Temco because the matter referred to by the district judge was a collateral matter which had nothing to do with the issue being tried, viz., "feeling between Mr. Evans and Mr. Hunt" (R. 191), which the district judge thought had been engendered by a disagreement between them, concerning which the district judge questioned one of the witnesses after recalling him to the stand at the conclusion of the trial (R. 186). Trials would be interminable if it were necessary or even permissible for a litigant to introduce all the available evidence in regard to every collateral matter which may be touched upon.

The district judge expressly disclaimed the petitioner's theory that his findings depended upon credibility of witnesses. He followed the remark heretofore quoted with: "I am not making any kind of insinuation that there has been any deliberate falsifying in the case, because I don't think there has. Both sides honestly have their own views about the matter. These views have been influenced by certain other factors that have arisen in the case which have a bearing on it" (R. 187).

What the district judge did was to analyze the evidence and draw therefrom the inference that Temco had made a contract with Stoves, Inc., whereby the latter would be its exclusive distributor in Florida for the entire calendar year 1948 (R. 189-191). The Court of Appeals was of the opinion, on its analysis of this evidence, that the inference drawn by the district judge was not justified, and that there was no such contract, express or implied (R. 221-227). The Court of Appeals was of the opinion that, under Tennessee law, the "usage and custom" found by the district judge to have existed as to the length of distributorship contracts (R. 191), did not justify the district judge's conclusion that Stoves, Inc.'s distributorship arrangement was a contract for the entire calendar year 1948 rather than a mere arrangement at will (R. 228).

A trial judge may have an advantage over an appellate court in determining whether witnesses have "deliberately falsified" if he hears their testimony and observes their demeanor on the witness stand. But when it comes to analyzing evidence and drawing inferences therefrom, the trial judge may be at a disadvantage because of the pressure he is under to reach a conclusion. In the case at bar, the district court adjourned court after the conclusion of the evidence until the following morning, at which time he announced his decision and stated that the case had been "one of the most difficult cases for me to decide," and that "about 1:30 this morning I reached what I thought was the proper decision in the case" (R. 187). The Court of Appeals, on the other hand, had before it the entire written record and ample time for consideration.

UNIFORMITY OF DECISION ON QUESTION PRESENTED IS ALREADY PROVIDED FOR BY RULE 52 (a).

Petitioner argues that this Court should allow the writ of certiorari in this case in order to secure a uniformity of decision among the circuits, on the question whether or not the decision of a district court on the credibility of witnesses is **final.** If this question were presented by the record—and it is not, as heretofore demonstrated—the Federal Rules of Civil Procedure have already done all that a review of this case could do to secure uniformity of decision among the circuits. Rule 52 (a) specifically provides that "**due regard** shall be given to the opportunity of the trial court to judge of the credibility of witnesses." (Emphasis ours.)

In conclusion, it is respectfully submitted that the petition for certiorari is without merit and should be denied.

Respectfully submitted,

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